Supreme Court, U. S.
FILED
OCT 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-214

BERKELEY SCHOOL DISTRICT, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS

ALBERT A. MICHENFELDER, JR.
EDWARD K. FEHLIG
ZIERCHER, HOCKER, TZINBERG, HUMAN & MICHENFELDER
130 South Bemiston Avenue
Suite 405
Clayton, Missouri 63105
(314) 727-5822
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-214

BERKELEY SCHOOL DISTRICT, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONERS

PROCEEDINGS SUBSEQUENT TO APPLICATION

On October 15, 1975, the Board of Education of the Ferguson-Florissant School District submitted to the United States District Court for the Eastern District of Missouri a Report concerning the implementation of the desegregation Plan, pursuant to the District Court's Order of January 9, 1975.

This Report notes that, because of "changing population patterns in the District," it is "virtually impossible in some areas to comply with student reassignment recommendations in the Plan," and specifically refers to the Berkeley School District's

Holman and Springdale Elementary Schools and the Berkeley Junior High.[1] Thus, the prediction of Berkeley's expert witness, David J. Armor, that the Three-District Plan will lead to resegregation in Berkeley, proves alarmingly accurate (Tr. 765, 766).

As shown on pages 4 and 5 of the Report, the new District is already experiencing unexpected financial problems due in part to the reduction in State aid resulting from the merger.[2] (The financial difficulties created by the Three-District Plan were discussed in Berkeley's Petition for Certiorari, page 16, footnote 11).

---

[1] Pages 9, 10 and 11 of the Report attached as a Supplemental Appendix (A-1-A-2) to this Brief. This Report, together with the exhibits incorporated therein, is 1¾ inches thick and is not reproduced herewith in its entirety.

[2] Pages 4 and 5 and one of the introductory pages of the Report attached as Supplemental Appendix. (A-3-A-5). The financial problems resulting from raising the Ferguson and Kinloch salaries to the Berkeley level had not been encountered as of the filing of the Report.

ARGUMENT

I

The Government's argument concerns itself with the 1937 wrongdoing by a then all-white community and remains blind to the fact that the effect of the retribution to be exacted upon the community (not upon the original wrongdoers themselves) will have the result in 1975 of resegregating a 40/60% unitary school district into a predominantly Black district. By fastening its attention solely on the events that occurred in 1937, the Respondent has ignored the sociological effect of the Decree and the entire thrust of the arguments made by the Berkeley School District in its Petition for Certiorari, to-wit:

1. Should not present conditions be the primary concern of the courts?

2. May the courts order the merger of independent school districts and a tax increase without voter approval even where unneeded to accomplish desegregation?

3. Are not demographic and sociological factors of primary importance in desegregation plans?

4. Should not the courts consider the views of Congress and order desegregation plans that minimize busing?

The fact that Berkeley, one of the few integrated school districts in St. Louis County, is, because of its inclusion in the desegregation Plan, experiencing population changes that will upset the racial balance that it now possesses, and the fact that the inclusion of Berkeley in the Plan will not accomplish desegregation in the Kinloch District, are matters that have neither been contested by Respondent nor given consideration by the courts

below.[3] Should these facts be ignored simply because Berkeley was segregated in 1937? Is retribution the overriding concern in desegregation cases? Does this not run counter to the Court's edict that desegregation plans must take "into account the practicalities of the situation" and must be "reasonable, feasible and workable"? *Wright v. Council of the City of Emporia*, 407 U.S. 451, 468, 469.

Brown v. Board of Education, 347 U.S. 483, is a landmark not only in the development of American law but also in the Nation's social progress. Now, over twenty years later, the United States Department of Justice in the instant case is concerned more with an ancient wrong than with present reality. Respondent's argument that the "nature of the violation determines the scope of the remedy" (Respondent's Brief, pages 6 and 7) does not take into account present conditions that should be considered in determining the nature of the violation. This argument does not take into account the fact that the desegregation of Kinloch, with its 979 pupils, can be affected by its inclusion in the Ferguson District with a student population of 16,556 pupils, which is less than 5% Black, and that this cannot be aided, enhanced or expedited by adding thereto the 1,724 Black pupils from Berkeley. Nor does the Respondent's argument consider the fact that the Black residents of Berkeley, who constitute over 40% of the school population there, outnumbering the pupils in Kinloch by two-to-one, are, because of the desegregation Plan, to be deprived of the right to live and be educated in an integrated community, and at the same time be subjected to a substantial increase in their property taxes, all because of a matter that occurred in 1937, over which they had no control.

---

[3] Cf. Joint Appendix, pages 5, 7, 11 and 12.

II

Respondent's cavalier disregard of the Missouri Constitution, which requires voter approval of school tax increases,[4] is expressed in the footnote that concludes its Brief. The contention that the Court-ordered tax increase is constitutionally permissible because it was "recommended by the state and county defendants" is an incredibly simplistic treatment of a subject to which this Court devoted 137 pages (*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1).

The Government offers no discussion of *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 232-234, upon which it relies to support the proposition that courts may order a tax increase to help implement desegregation plans. The judgment ordering the Prince Edward County "Supervisors to exercise the power *that is theirs* to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia" (l.c. 233, emphasis added) is no authority for the Court of Appeals to affirm an Order that takes from the voters in the Berkeley School District a right that they possess under a provision in the Missouri Constitution that is not discriminatory in purpose or in effect.

---

[4] Missouri Constitution, Article X, §§ 11(b) and (c); discussed in Berkeley's Petition, page 13.

CONCLUSION

The Petition for Writ of Certiorari, heretofore filed by Berkeley School District, et al., should be granted.

Respectfully submitted

ALBERT A. MICHENFELDER, JR.
EDWARD K. FEHLIG
130 South Bemiston Avenue
Suite 405
Clayton, Missouri 63105
(314) 727-5822
Attorneys for Petitioners

October, 1975